

# The Brownfields Amendments: New Opportunities, New Challenges—Part II

by Scott H. Reisch

This column is sponsored by the CBA Environmental Law, Water Law, and Mineral Law Sections. The Sections publish articles of interest on local and international topics.

**This two-part article describes important new amendments that make changes to CERCLA's liability provisions, provide new federal funding for contaminated properties known as "brownfields," and make other changes intended to promote the cleanup and redevelopment of brownfields. Part I was printed in June 2002.**

## Column Editors:

*Maki Iatridis of Vranesh and Raisch LLP, Boulder (Environmental)—(303) 443-6151; Michael F. Browning of Porzak Browning & Bushong LLP, Boulder (Water)—(303) 443-6800; Gus Michaels, Boulder (Mineral)—(303) 442-3688*

## About The Author:

*This month's article was written by Scott H. Reisch, a partner in the Environmental Practice Group of Hogan & Hartson LLP's Denver office—(303) 899-7355.*



In January 2002, President Bush signed the "Small Business Liability Relief and Brownfields Revitalization Act" ("Amendments"),<sup>1</sup> designed to promote redevelopment of "brownfields"—properties that are underdeveloped or underused because of the actual or potential presence of contamination. This Part II of a two-part series describes the Amendments and their likely impact. Part I described changes the Amendments made to the liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA").<sup>2</sup> Part II describes the new federal funding that will be available to promote brownfields redevelopment and state voluntary cleanup programs, as well as the inevitable "strings" attached to the funding.

## Brownfields Funding

Congress authorized spending up to \$200 million annually through fiscal year 2006 to fund two distinct federal brownfields programs: (1) a Brownfields Site Characterization and Assessment Grant Program; and (2) a program for grants and loans for brownfields remediation.<sup>3</sup> The brownfields assessment grants will provide funds to "eligible entities" for programs to inventory, characterize, assess, and conduct planning related to "brownfields sites," while the remediation grants will be used to capitalize revolving loan

funds and to fund site-specific grants to "eligible entities" and nonprofits, to be used directly for remediation of brownfield sites.<sup>4</sup>

## Brownfields Sites

To qualify for funding under either program, the site at which the funds will be spent must meet the definition of a "brownfields site." The Amendments define a brownfields site as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."<sup>5</sup> The term specifically excludes certain types of facilities, largely because they already are undergoing cleanup pursuant to another federal program.

Excluded facilities consist of those:

- 1) already subject to a planned or ongoing CERCLA removal action;<sup>6</sup>
- 2) listed, or proposed to be listed, on the National Priorities List, on which the U.S. Environmental Protection Agency ("EPA") lists the most contaminated sites in the country;
- 3) subject to an administrative or court order or judicial decree issued or entered pursuant to CERCLA;
- 4) subject to either an administrative or court order or judicial decree or that have been issued a permit under the Resource Conservation and Recovery Act ("RCRA"), the Federal

Water Pollution Control Act, the Toxic Substance Pollution Control Act ("TSCA"), or the Safe Drinking Water Act;

- 5) subject to corrective action under RCRA and the recipient of a corrective action permit or order that requires implementation of corrective measures;
- 6) land disposal units that have submitted a closure notification under RCRA subtitle C and have "closure requirements" specified in a closure plan or permit; and
- 7) "subject to the jurisdiction, custody or control" of the United States, other than Indian trust lands.<sup>7</sup>

The term "brownfields site" also does not include a "portion of a facility" where polychlorinated biphenyls ("PCBs") have been released and that is subject to remediation pursuant to TSCA, or that has obtained assistance for response activity pursuant to RCRA's Leaking Underground Storage Tank ("LUST") Trust Fund.<sup>8</sup> Notwithstanding these exclusions, both PCB and LUST sites and the sites described above, in paragraphs 1, 4, 5, and 6, may be eligible for brownfields funding on a site-by-site basis if certain criteria are met. Funding would be available for these sites only if such funding would "protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes."<sup>9</sup>

### Additional Areas

In addition to "brownfields sites," the Amendments provide that brownfields funding may be made available to "additional areas."<sup>10</sup> "Additional areas" are those sites that fall within the definition of "brownfields site" and meet any of the following three criteria:

1. The site is contaminated by a controlled substance.
2. The site is "mine-scarred land."
3. The site is contaminated by a petroleum product that does not meet the definition of a "hazardous substance" under CERCLA § 101 and:
  - a) EPA or the state has determined the site is "of relatively low risk, as compared with other petroleum-only sites in the State";
  - b) EPA or the state has determined that the site has no "viable responsible party" and it will be "assessed, investigated, or cleaned up" by a party that

- could not be held potentially liable for cleaning the site; and
- c) the site is not subject to an order under RCRA § 9003.<sup>11</sup>

There is little doubt that Congress intended to expand the range of sites eligible for funding by defining "additional areas,"<sup>12</sup> but poor drafting may have gotten in the way. A site cannot qualify as an "additional area" unless it meets the definition of brownfields site and the additional criteria set forth in the definition of "additional area."

As a matter of pure logic, adding new criteria without waiving the existing criteria cannot possibly expand the range of eligible sites. For example, a hypothetical site that is contaminated solely with petroleum would not meet the above criteria because such a site is not a "brownfields site" where the "presence or potential presence of a hazardous substance, pollutant, or contaminant" has complicated redevelopment because petroleum is not a "hazardous substance, pollutant or contaminant." Nevertheless, it is clear that Congress intended to provide brownfields funding for such sites, and EPA will have to find a way to give effect to that clear Congressional intent.<sup>13</sup>

### Eligible Entities

The statutory scheme established by the Amendments depends heavily on the work of "eligible entities," to which the new brownfields funds are to be disbursed. Under the Amendments, "eligible entities" consist of the following: (1) general purpose units of local government; (2) quasi-governmental entities, such as land clearance authorities, that are either supervised and controlled by, or are agents of, a general purpose unit of local government; (3) government entities created by a state legislature; (4) regional councils or groups of general purpose units of local government; (5) redevelopment agencies that are chartered or otherwise sanctioned by a state; (6) states; (7) non-Alaskan Indian Tribes; or (8) any Alaska Native Regional Corporation, Alaska Native Village Corporation, and the Metlakatla Indian community.<sup>14</sup>

### Brownfields Site Characterization and Assessment Grant Program

Under the new Brownfields Site Characterization and Assessment Grant Program, EPA will make grants "to inventory, characterize, assess, and conduct planning

related to brownfields sites" and to "perform targeted site assessment at brownfields sites."<sup>15</sup> An eligible entity may receive grants on either a community-wide or site-by-site basis. Individual sites ordinarily may not receive more than \$200,000,<sup>16</sup> but EPA can increase the limit to \$350,000 based on the "anticipated level of contamination, size, or status of ownership of the site."<sup>17</sup> Any site characterization and assessment performed with these grant funds must be completed in accordance with the same requirements that apply to any purchaser seeking to establish that it has met the standard for "all appropriate inquiry" applicable to "innocent landowners."<sup>18</sup>

The Amendments require EPA to select grant recipients according to a ranking system to be established by the EPA Administrator. The system must include ten "ranking criteria" outlined in the Amendments, including: the ability of the grant to stimulate economic development of the area; the availability of other remediation funds; whether the grant will aid in the discovery and reduction of threats to human health and the environment; whether the grant would "further the fair distribution of funding between urban and non-urban areas"; the extent to which the grant would provide for community involvement in cleanup and land use decisions; and the extent to which the grant would aid in the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations.<sup>19</sup>

The new brownfields assessment grants are an outgrowth of EPA's existing Brownfields Assessment Demonstration Pilot Program, which has distributed grants of up to \$200,000 each to almost 400 communities in the last seven years. Unlike the new program, the pilot program did not require recipients to abide by innocent landowner requirements in conducting their assessments.<sup>20</sup>

### Brownfields Remediation Grants and Loans

Brownfields remediation grants of up to \$1 million each may be disbursed to eligible entities for use in capitalizing a revolving loan fund.<sup>21</sup> Grants of up to \$200,000 per site may be issued to eligible entities or nonprofit organizations to remediate brownfields sites owned by the grant recipient.<sup>22</sup>

An eligible entity that receives a grant to capitalize a revolving loan fund may

lend those funds to another eligible entity, a site owner, a site developer, or another person.<sup>23</sup> Alternatively, the eligible entity may use the revolving loan fund monies to make grants to other eligible entities or nonprofit organizations to remediate their owned sites.<sup>24</sup> There does not appear to be any cap on the size of such grants.

In deciding which eligible entities will receive grants under this program, the eligible entity making the grants must use the same ranking criteria as EPA uses in rating potential assessment grant recipients.<sup>25</sup> Whenever EPA or an eligible entity makes a grant for remediation of a site owned by a nonprofit or another eligible entity, the grant must be "warranted," based on an evaluation of enumerated factors, most of which are similar to the "ranking criteria" that apply to all other grants made under the new programs.<sup>26</sup>

Like the new assessment grant program, the remediation funding provided by the Amendments codifies an existing EPA program. Under EPA's existing Brownfields Revolving Loan Fund, EPA has awarded 143 grants to thirty-nine states and the District of Columbia, totaling almost \$91 million.<sup>27</sup>

In Colorado, EPA funding was used to capitalize the Colorado Brownfields Revolving Loan Fund, which is administered by the cities of Commerce City, Englewood, Lakewood, Loveland, and Denver, with assistance from the Colorado Department of Public Health and the Environment ("CDPHE") and the Colorado Housing and Finance Authority. The Colorado Brownfields Revolving Loan Fund provides monies to finance environmental cleanups along the Front Range.<sup>28</sup>

### Conditions and Limitations

Federal funds almost never come without conditions and limitations on how the funds can be used; the new brownfields funding is no exception. The Amendments expressly forbid use of any grant or loan to pay for: (1) fines or penalties; (2) federal cost-share requirements; (3) a "response cost" at a brownfields site for which the recipient of the funds is "potentially liable" under CERCLA § 107; (4) costs of complying with a federal law, other than laws relating to a cleanup; and (5) administrative costs, which do not include costs associated with investigating or identifying the level

of contamination, designing or performing a response action, or monitoring a natural resource.<sup>29</sup>

The prohibition against using brownfields funds to pay administrative expenses is a step backward, as existing brownfields programs allow some percentage of the total grant to be used for such purposes.<sup>30</sup> Although most of the other restrictions are not surprising, the prohibition against using federal funds for "response costs" for which the recipient is "potentially liable" under CERCLA § 107 may prove challenging for some parties.

Under CERCLA, "response costs" include costs of remediation,<sup>31</sup> which is precisely for what brownfields remediation grants are supposed to be used. Moreover, it is not clear what "potentially liable" means. For example, is a site owner that may qualify for a defense "potentially liable?" Arguably, given CERCLA's strict liability scheme, any person who owns contaminated property is "potentially liable" under CERCLA § 107, even if the person did not cause the contamination. Under the current revolving fund program, EPA has been willing to provide funds to persons who:

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Thomas Jefferson to Elbridge Gerry, 1797.



**Chuck Kall**

acquired the property after the time of disposal or placement of hazardous substances, if the lead agency determines that the owner/operator has not caused, contributed to, permitted, or exacerbated the release of a hazardous substance on, or emanating from that property.<sup>32</sup> Whether EPA will interpret the Amendments' language similarly remains to be seen.

In addition to these restrictions, recipients of brownfields loans and grants must abide by the terms of an agreement that each recipient is required to execute.<sup>33</sup> Pursuant to these agreements, any remediation work performed with brownfields funds must be conducted in accordance with the National Contingency Plan ("NCP")—namely, EPA regulations that establish substantive and procedural requirements for cleanups—to the extent that the Administrator determines this requirement is "relevant and appropriate to the program."<sup>34</sup>

The recipient also must: (1) comply with applicable federal and state laws; (2) ensure that the "cleanup protects human health and the environment"; (3) use the grant or loan only for the purposes specified in the Amendments; (4) if it is an eligible entity, pay a matching share equal to at least 20 percent from non-federal sources of funding, unless EPA determines that a matching share obligation would place an undue hardship on the eligible entity; and (5) abide by any other requirement EPA deems necessary.<sup>35</sup>

The limited NCP compliance requirement is the most important of these restrictions. Under EPA's existing revolving loan fund program, all program funds must be incurred in accordance with the NCP. The Amendments' language apparently is an effort to relax that requirement.<sup>36</sup> Whether it will have that impact remains to be seen. One of the NCP's key (and most criticized) requirements is that cleanups must reduce contamination to a level that is consistent with "applicable or relevant and appropriate standards," such as drinking water standards, which may be more stringent than the "risk-based" cleanup standards often used at brownfields sites.<sup>37</sup> Thus, a grant applicant seeking monies made available by the Amendments to pay for a risk-based cleanup at a brownfields site may be in the unenviable position of asking EPA to determine that cleanup standards found to be "relevant and appropriate" under the NCP are not "relevant and appropriate" to the brownfields program.

Finally, any work paid for with the new brownfields money must comply with the Davis-Bacon Act of 1931 ("Davis-Bacon"),<sup>38</sup> which requires that workers performing construction, repair, or alteration work must be paid a "prevailing" wage. The applicability of Davis-Bacon to brownfields funding was a major issue when the Amendments were considered by Congress last year. At that time, Democrats advocated adding an explicit statement of Davis-Bacon's applicability, while Republicans opposed making brownfields programs subject to Davis-Bacon. (The existing revolving loan fund also was subject to Davis-Bacon.) In the end, the Parties compromised by avoiding any explicit reference to Davis-Bacon in the Amendments, but attached the Amendments to CERCLA § 104, which already references Davis-Bacon.<sup>39</sup>

### Funding for Brownfields Program "Infrastructure"

In addition to the funds for state cleanup programs (*see* the next section), the Amendments authorize the Administrator either to establish a program to provide, or to give funds to an eligible entity or non-profit organization to provide, "training research and technical assistance to individuals and organizations" for the facilitation of, among other things, the identification, assessment, and remediation of brownfields sites, community involvement, or site preparation.<sup>40</sup> The funds expended on this program cannot exceed 15 percent of the total expenditures of the brownfields assessment and remediation grants in any fiscal year.<sup>41</sup>

Further, any local government that receives a brownfields grant may use up to 10 percent of the grant funds to develop and implement a brownfields program that may include monitoring the health of populations exposed to hazardous substances from a brownfields site.<sup>42</sup> Local governments also may use these grant funds to monitor and enforce institutional controls (that is, land use restrictions) that are intended to prevent human exposure to any hazardous substance from a brownfields site.<sup>43</sup>

### Funding for State Response Programs

The Amendments authorize \$50 million annually through fiscal year 2006 to fund grants for state and tribal cleanup programs that either include, or are taking reasonable steps to include, each of the

following elements: (1) timely survey and inventory of brownfields sites; (2) oversight and enforcement authority adequate to ensure that response actions will protect human health and the environment, will be conducted in accordance with federal and state law, and will be completed even if the person conducting the action fails to do so; (3) meaningful opportunity for public participation (for example, public access to documents, opportunity for comment, and input from persons who are or may be affected by the contamination); and (4) appropriate process for approval of a cleanup plan, including a requirement for verification by and certification from the state, tribe, or a licensed site professional that the response is complete.<sup>44</sup>

States and tribes that do not meet these requirements still are eligible for EPA funding if they have entered into a Memorandum of Agreement ("MOA") with the United States for a voluntary response program. CDPHE and EPA signed such an agreement in April 1996 concerning Colorado's administration of the Voluntary Cleanup and Redevelopment Act.<sup>45</sup> Because of the existence of this MOA, Colorado is eligible for funds under this new program.

States and tribes that receive federal grants under the Amendments may use the funding to establish or enhance existing response programs. Funds also may be used to: (1) capitalize a revolving loan fund for brownfields remediation; or (2) purchase insurance or develop a risk-sharing pool, indemnity pool, or insurance mechanism to provide financing for response actions under a state response program.<sup>46</sup>

### Conclusion

The additional funding offered by the Amendments will no doubt spur more interest in brownfields redevelopment in Colorado. By expressly encouraging funding of petroleum sites and allowing funding for mine-scarred lands, the Amendments will expand the range of sites that can be addressed through brownfields programs.

Additional funding of CDPHE's program may enable CDPHE to expand the existing revolving loan fund to cover sites beyond the Front Range. Private parties who are willing and able to navigate their way through the various requirements and restrictions that come with the new brownfields funding will have an additional source of funding at hand—and a leg up on their competitors.

## NOTES

1. Small Business Liability Relief and Brownfields Revitalization Act, Pub.L. 107-118; H.R. 2869 (codified at 42 U.S.C. §§ 9601, 9604, 9605, 9607, and 9622(g)). For the text of brownfields amendments and legislative history, see <http://thomas.loc.gov> and enter H.R. 2869.
2. 42 U.S.C. §§ 9601 *et seq.*; see Reisch, "The Brownfields Amendments: New Opportunities, New Challenges—Part I," 31 *The Colorado Lawyer* 99 (June 2002).
3. *Supra*, note 1 at Title II, § 211(b) (codified at 42 U.S.C. § 9604(k)(2), (3), and (12)).
4. *Id.* (codified at 42 U.S.C. § 9604(k)(2) and (3)). The Amendments specifically allow the recipient of a brownfields loan or grant targeted to a specific brownfields site to use a portion of those monies to purchase insurance for the characterization, assessment, or remediation of the site.
5. *Id.* at Title II, § 211(a) (codified at 42 U.S.C. § 9601(39)(A)).
6. *Id.* (codified at 42 U.S.C. § 9601(39)(B)(i)). "Removal" actions assess, monitor, or mitigate a release of hazardous substances. They generally involve shorter-term measures, such as fencing and excavations, as opposed to long-term treatment of contaminated soil or groundwater. 42 U.S.C. § 9601(23).
7. *Id.* (codified at 42 U.S.C. § 9601(39)(B)(i) through (vii)).
8. *Id.* (codified at 42 U.S.C. § 9601(39)(B)(viii) through (ix)).
9. *Id.* (codified at 42 U.S.C. § 9601(39)(C)).
10. *Id.* (codified at 42 U.S.C. § 9601(39)(D)).
11. *Id.*
12. See 147 Cong. Rec. S3904 (April 25, 2001) (remarks of Sen. Inhofe).
13. *Supra*, note 1 at Title II, § 211(b) (codified at 42 U.S.C. § 9604(k)(12)(B)), requiring that 25 percent of the new brownfields funding be used for characterization, assessment, and remediation of petroleum sites that meet the criteria for "additional areas."
14. *Supra*, note 1 at Title II, § 211(b) (codified at 42 U.S.C. § 9604(k)(1)(A) through (H)).
15. *Id.* (codified at 42 U.S.C. § 9604(k)(2)(A)(i) and (ii)).
16. *Id.* (codified at 42 U.S.C. § 9604(k)(4)(A)(i)(I)).
17. *Id.* (codified at 42 U.S.C. § 9604(k)(4)(A)(i)(II)).
18. *Id.* (codified at 42 U.S.C. § 9604(k)(2)(B)(ii)); *id.* at Title II, § 223(2) (codified at 42 U.S.C. § 9601(35)(B)).
19. *Supra*, note 1 at Title II, § 211(b) (codified at 42 U.S.C. § 9604(k)(5)(C)(viii) through (x)).
20. See EPA, "399 U.S. EPA Brownfields Assessment Demonstration Pilots," available at <http://www.epa.gov/brownfields/pdf/pilotlst.pdf>.
21. *Supra*, note 1 at Title II, § 211(b) (codified at 42 U.S.C. § 9604(k)(4)(A)(ii)). Additional grants may be made to the same revolving loan fund in subsequent years, depending on the demonstrated success of the fund, the number of sites and communities impacted, and the demand for funds by eligible entities that previously have not received grants.
22. *Id.* (codified at 42 U.S.C. § 9604(k)(3)(A)(i) and (ii)).
23. *Id.* (codified at 42 U.S.C. § 9604(k)(3)(B)(i)).
24. *Id.* (codified at 42 U.S.C. § 9604(k)(3)(B)(ii)).
25. *Id.* (codified at 42 U.S.C. § 9604(k)(3)(B)).
26. *Id.* (codified at 42 U.S.C. § 9604(k)(3)(C)(i) through (v)).
27. See EPA, "Whitman Announces \$21.5 Million to Revitalize Blighted Communities in 17 States" (May 3, 2002), available at [http://www.epa.gov/epahome/headline\\_050302.htm](http://www.epa.gov/epahome/headline_050302.htm).
28. "Colorado Brownfields Revolving Loan Fund, Program Guidelines" (April 5, 2001), available at <http://www.cdphe.state.co.us/hm/rpbrownfields.asp>.
29. *Supra*, note 1 at Title II, § 211(b) (codified at 42 U.S.C. § 9604(k)(4)(B)(i) and (ii)).
30. EPA, "Brownfields Cleanup Revolving Loan Fund Administrative Manual" (May 1998) at VII.B, available at <http://www.epa.gov/brownfields/html-doc/rlfadmin.htm>.
31. 42 U.S.C. § 9601(25) ("response" includes "remediation").
32. EPA, "Clarification of Borrower Eligibility Under the Brownfields Cleanup Revolving

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Loan Fund Program" (Sept. 5, 2000), available at <http://www.epa.gov/brownfields/html-doc/causemo.htm>.

33. *Supra*, note 1 at Title II, § 211(b) (codified at 42 U.S.C. § 9604(k)(9)).

34. *Id.* (codified at 42 U.S.C. § 9604(k)(9)(A)).

35. *Id.* (codified at 42 U.S.C. § 9604(k)(9)(B)(i) through (iv)).

36. *Supra*, note 30 at 7 and 22.

37. 40 C.F.R. § 300.415(j).

38. 40 U.S.C. §§ 276a to 276a-5 and 42 U.S.C. § 3222.

39. 42 U.S.C. § 9604(g).

40. *Supra*, note 1 at Title II, § 211(b) (codified at 42 U.S.C. § 9604(k)(6)(A)).

41. *Id.* (codified at 42 U.S.C. § 9604(k)(6)(B)).

42. *Id.* (codified at 42 U.S.C. § 9604(k)(4)(C)).

43. *Id.*

44. *Id.* at Title II, § 231(b) (codified at 42 U.S.C. § 9628(a)(2)).

45. See "Memorandum of Agreement Between the Colorado Department of Public Health and Environment and the United States Environmental Protection Agency, Region VI-II" (April 1996); available at <http://www.cdph.state.co.us/hm/rpvcmoa.asp>.

46. *Supra*, note 1 at Title II, § 231(b) (codified at 42 U.S.C. § 9628(a)(1)(B)). ■

### Legal Aid Foundation Wine & Beer Tasting/Silent Auction Thursday, October 17, 2002, in Denver

Just how much do you know about *hefeweizen* or *shiraz*? You can learn about them while enjoying their flavors at the Ninth Annual Wine & Beer Tasting and Silent Auction to benefit the Legal Aid Foundation ("LAF"). Tickets are on sale for the October 17, 2002, event, which will be held from 5:30 to 7:30 P.M. at the National and State Historic Landmark, 1770 Sherman St., in Denver. This year's tasting is being touted as a "casually elegant" affair that will include *hors d'oeuvres* from local restaurants; wines; beers and new malt beverages; a silent auction; and live music. Silent auction bidders will have a full range of items from which to choose, including restaurant certificates, sporting event and arts event tickets, mountain vacation stays, and retail certificates and/or items.

The LAF raises funds for Colorado Legal Services, which provides free civil legal assistance to the disadvantaged in the community. The tasting/silent auction is LAF's largest fund-raising event in Denver each year and is a fun way to support the work of Colorado Legal Services.

The 1770 Sherman Street event complex is considered to be the finest example of Moorish Revival architecture in the region, and the wine and beer tasting will take place on the beautiful Arts and Crafts-styled main floor. The building is within walking distance of downtown or uptown Denver, and street parking should be adequate after business hours. Tickets are \$28 before October 17 and \$30 on event day at LAF offices and at the door. Call the Legal Aid Foundation at (303) 863-9544 for more information and to order tickets, or come by the LAF office at 1900 Grant St., Ste. 1112, between 9 A.M. and 5 P.M.

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